

IN THE HIGH COURT OF DELHI AT NEW DELHI

Delivered on May 31, 2007

+ CRL.REV.P. 643/2005

ARUN KUMAR

..... Petitioner

Through Mr. A.S. Chadha & Mr. J.N. Aggarwal,
Advocates

versus

MEENU KUMAR

..... Respondent

Through Mr. Alok Agarwal, Advocate

CORAM:**Mr. Justice S. Ravindra Bhat**

1. Whether reporters of local papers may be disclosing allowed to see the judgment.? parties. yes, but without the names of the parties.

2. To be referred to the Reporter or not? disclosing parties. yes, but without the names of the parties.

3. Whether the judgment should be reported in the Digest? yes

Mr. Justice S. Ravindra Bhat (Open Court)

1. This petition seeks interference with the order of the Additional Chief Metropolitan Magistrate (hereafter referred to as “the trial Court”) dated 9th June, 2005. The trial Court was dealing with an application under Section 125 Cr.P.C. filed by the respondent/ wife. The trial Court proceeded to grant interim maintenance of Rs. 5,000/- per month w.e.f 01.06.05.

2. The marriage between the parties took place on 08.10.99. It is a common case of the parties that the complainant/respondent was the second wife of the petitioner who had three major married children from his first marriage. It is also a fact that the complainant too had three children from her earlier marriage. The allegations in the complaint, *inter alia*, extended to mis-behaviour and acts of cruelty. It was alleged that the petitioner/ husband had vast assets and was in possession of income to the tune of Rs. 78,000/- per month. It was stated that the petitioner had seven immovable properties. The trial Court after considering the materials, directed the petitioner to pay Rs. 5,000/- per month to the complainant.

3. This order has been impugned for two reasons. One, that the Court has overlooked Section 125 (4) which stipulates, *inter alia*, that if the wife lives in adultery there would be no order for maintenance including interim maintenance. Learned counsel for the petitioner relied upon an affidavit filed by one Mr. Ashok Soni dated 05.04.05. In that, the deponent suggested, *inter alia*, that the complainant/wife stayed with him. The affidavit was filed in support of an application seeking pardon in a criminal complaint filed by the present petitioner against his wife and that deponent. It is submitted that the police filed a final report in those proceedings before the concerned Court.

4. Learned counsel contended that in the light of the above facts, the respondent/wife was dis-entitled to any relief and, therefore, the approach of the trial Court in granting interim maintenance was irregular and liable to be interfered with.

5. The petition was resisted on behalf of the complainant/ respondent. It was contended on her behalf that the petitioner has vast properties and by his conduct in not complying with the Court's orders (which had restrained him from dispossessing the complainant from the properties where she was residing) he has forfeited his right to press this petition. It was also contended that the provisions of Section 125 (4) Cr.P.C. have also to be considered in the light of the Protection of Women from Domestic Violence Act, 2005 which entitles the aggrieved spouse to have a residential right in the matrimonial home.

6. Learned counsel for the respondent/wife relied upon the judgment of the Punjab & Haryana High Court in the case reported as *Jagir Singh -v- Jasbir Kaur* 2005 CrL.L.R. 572.

7. The above factual matrix would show that the complainant applied for maintenance under Section 125 Cr.P.C. The trial Court, after considering the averments proceeded to award the amount of Rs. 5,000/- per month as interim maintenance. The contention of the petitioner, to the extent that the trial Court's order does not deal with the averments in the reply of the petitioner/husband, is correct. Facially, there is no discussion by the trial Court about the reply of the husband who is the petitioner. The question, therefore, is whether this amounts to an illegality which requires to be set aside having regard to the circumstances of this case.

8. Section 125 Cr.P.C. to the extent it is relevant reads as follows:

“ 125. Order for maintenance of wives, children and parents- (1) If any person having sufficient means neglects or refuses to maintain-

(a) his wife, unable to maintain herself, or
 (b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or
 (c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or
 (d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate, as such magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.

[Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this sub-section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct:

Provided also that an application for the monthly allowance for the interim maintenance and expenses for proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person.

Explanation – For the purpose of this Chapter-

(a) “minor” means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875) is deemed not to have attained his majority;

(b) “wife” includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

(2) xxxxxxxx xxxx xxxxxx xxxx

(3) xxxxxxxx xxxx xxxxxx xxxxxx

(4) No wife shall be entitled to receive an [allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be,] from her husband under this

section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.”

9. In this case, the reply of the husband was filed on 19.11.03. There appears to be a supplementary affidavit which was replied on 26.03.04 by the wife. It is stated by counsel that the affidavit of Shri Ashok Soni was brought on record of the trial Court through an application dated 15.04.05. The affidavit of Shri Ashok Soni is dated 05.04.05
10. In the judgment of the Punjab & Haryana High Court in *Jagir Singh's* case the Court held as follows:

“ In this petition, counsel for the petitioner raised two-fold submissions, firstly, that since the petitioner has alleged that the respondent-wife is living in adultery, therefore, no interim maintenance can be granted to her in view of amendment made in sub-section (4) of Section 125 Cr.P.C. by the Legislation vide Act No. 50 of 2001. Vide this amendment words “allowance for maintenance or the interim maintenance and expenses of proceedings, as the case may be”, have been added in sub-section (4), which provide that no wife shall be entitled to receive an allowance for maintenance or interim maintenance if she is living in adultery. Learned counsel for the petitioner, thus, contends that intention of sub-section (4) is very much clear that no wife, who is living in adultery, shall be entitled to any allowance including interim maintenance. It is further contended that word “allowance” not only includes the initial maintenance amount, but includes the interim maintenance amount also. Therefore, the respondent-wife, in the case in hand, who is living in adultery, is not entitled to any allowance under sub-section (4) of Section 125 Cr.P.C. Secondly, he submitted that respondent No.2 is major, therefore, she is not entitled for maintenance. However, he admitted that respondent No.2 is still unmarried.

5. I have considered the aforesaid two submissions made by the learned counsel for the petitioner and am not inclined to accept the same. In my view interim maintenance cannot be denied to the respondent-wife merely on the ground that petitioner-husband has made an allegation that she is living in adultery. Denial of interim maintenance just on the basis of such an allegation would not be justified until and unless the allegation

is substantiated by any cogent evidence by the husband”

11. Learned counsel for the petitioner sought to distinguish the decision in the case on the ground that factual matrix was facially different and this was not a case of mere allegation but there were some other proofs also.

12. The contextual backdrop of each case would of course differ, yet the ratio of the decision by the Punjab & Haryana High Court is that the Court must adopt a cautious approach, and should not rush into presumption on the basis of allegations. The allegation can be in the form of reply or affidavit. In this case what emerges from the record at least today is that the petitioner has sought to bring on record the affidavit of the person who was seeking pardon. The genuineness or otherwise of such an affidavit and the circumstance under which it was sworn cannot be divorced from the facts of this case. It is true that the trial Court has not adverted to it but there cannot be an assumption that this was pressed, and yet consciously not adverted to.

13. Another aspect which has to be seen is that the contents of the affidavit are untested; though the deponent mentioned that the complainant stayed with him, the next assumption that such a residence amounted to adultery, would be drastic. In any form of proceeding, to conclude adultery, where civil consequences spelt out under Section 125 (4) are to be inferred, the party likely to be affected has to be given reasonable and fair opportunity to meet and rebut the charge. Though Section 125 Cr.P.C. is in the nature of a welfare measure, and perhaps falls within the description of “special provision” under Article 15 (3) of the Constitution, the exception under Section 125 (4), loaded as it is in gender

unequal terms, against the woman, has to be made recourse to with care and circumspection. The enacting part of Section 125, which entitles a woman to maintenance, makes no distinction whether the cause for her approaching the Court is adultery or infidelity of the husband; yet, the possible effect, viz estrangement and the situation of her living in adultery, is sought to ground a denial of that welfare measure. Without entering into the logic of this enforcement of morality through the legal process - which has to receive a wider debate, what can be said is that the Court should loath to rush into conclusions or *a priori* assumptions, since Section 125 (4) enacts an exception. It should be satisfied about the soundness of such a charge, and cannot be content to elevate allegations into findings.

14. In view of the above discussion and after taking into consideration the overall conspectus of the facts of this case, I am of the opinion that the trial Court should proceed and dispose off the application under Section 125 Cr.P.C finally within four months.

15. It is a matter of record that the petitioner has already paid 50 per cent of the amount which works out to Rs. 60,000/-. The balance shall be deposited in the trial Court to be appropriated having regard to the final outcome of the proceedings under Section 125 Cr.P.C. The parties shall appear before the trial Court on 10th July, 2007.

The petition is disposed off in the above terms.

Order Dasti.

S.RAVINDRA BHAT, J

MAY 31, 2007
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